

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

IN RE:	§	
	§	
GARY CARL McKINZIE AND	§	CASE NO. 04-50240-RLJ-13
MYRA DELL McKINZIE,	§	
	§	
DEBTORS	§	

**MEMORANDUM OPINION**

Gary and Myra McKinzie, the debtors, have objected to the proof of claim filed by the United States of America, Department of Agriculture, Farm Service Agency ("FSA"). FSA filed its proof of claim on July 13, 2004, in the amount of \$65,034.08. The debtors contend that FSA's claim should be disallowed because the statute of limitations for collection of the debt has passed.

This Court has jurisdiction of this matter under 28 U.S.C. §§ 1334(b) and 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(1) and (b)(2). This Memorandum Opinion contains the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and FED. R. BANKR. P. 9014.

**Statement of Facts**

The facts in this case are not in dispute. FSA asserts a claim against the debtors under a promissory note in the original principal amount of \$40,000, dated April 23, 1979. The note provides for forty-one annual installments of principal and interest in the amount of \$3,536, due January 1 of each year beginning January 1, 1980. The note matures in 2019, forty years from the date of the note.

The debtors have apparently made no payments on the note -- FSA has no record of any

payments being made and the debtors have no knowledge of making any payments. The note contains a “discretionary” acceleration clause, meaning FSA has the option of declaring the note due and payable upon default. FSA in fact accelerated the note by letter dated March 24, 2003.

The debtors filed a prior bankruptcy case on February 3, 2003, which case was apparently dismissed. The present case was filed February 27, 2004. The debtors contend that FSA’s claim should be disallowed, in part, as barred by the statute of limitations. The debtors argue that limitations runs upon each missed payment, beginning with the first payment due January 1, 1980. FSA contends that limitations did not begin running until it accelerated the note on March 24, 2003.

### **Discussion**

The applicable limitations period is set forth at 28 U.S.C. § 2415, which provides in relevant part as follows:

[E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . . .

The courts have applied this provision where limitations is at issue on actions brought by the United States or its agencies on notes or other contracts. *See, e.g., FDIC v. Belli*, 981 F.2d 838 (5th Cir. 1993); *SMS Financial LLC v. ABCO Homes, Inc.*, 167 F.3d 235 (5th Cir. 1999).

In the context of promissory notes, the law of limitations differentiates between instruments containing automatic acceleration clauses and instruments containing optional acceleration clauses. In the case of a default under the former, “the debt is fully matured and the statute of limitations begins running when the debtor first defaults.” 54 C.J.S. *Limitations of Actions* § 153. In the

latter, “the debtor is not liable for payment on future nondelinquent installments ‘until the creditor chooses to take advantage of the clause and accelerate the balance. Unless the creditor exercises the option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due . . . .’” *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993) (quoting 54 C.J.S. *Limitations of Actions* § 153).

In construing the language of section 2415 as applied to promissory notes, several courts outside the Fifth Circuit hold that the “right of action accrues” when the note’s maturity is accelerated or when the note matures. *United States v. Feterl*, 849 F.2d 354, 356 (8th Cir. 1988); *United States v. Gilmore*, 698 F.2d 1095, 1097 (10th Cir. 1983); *United States v. Alessi*, 599 F.2d 513, 515 (2d Cir. 1979). FSA urges this Court to adopt this reasoning in this case. FSA overlooks two cases, however, where the Fifth Circuit examined the meaning of the “right of action accrues” language and determined “that a cause of action accrues when it comes into existence.” *Belli*, 981 F.2d at 840 (5th Cir. 1993); *SMS Financial LLC*, 167 F.3d at 241-42 (5th Cir. 1999). Thus, the six years limitations period of section 2415(a) begins to run when a right to sue on the underlying obligation arises. *See id.*; *see also Seward v. United States Dep’t of Agriculture*, 229 F. Supp.2d 557, 569 (S.D. Miss. 2002). Stated differently, limitation begins to run upon default by the obligor. *Id.*

Here, by its March 24, 2003 letter to the debtors, FSA gave notice of its intention to accelerate the original \$40,000 loan. The debtors had defaulted, however, on every annual payment that had come due since January 1, 1980. Under *Belli* and *SMS*, a cause of action for each missed payment accrued upon each default. Therefore, FSA had six years from each default to initiate suit,

and, upon failing to do so, is barred from seeking recovery. The parties agree that, given the debtors' prior bankruptcy filing on February 3, 2003, FSA was stayed from taking any action to collect on the note. FSA is therefore barred from recovering all sums represented by the missed payments from January 1, 1980, through January 1, 1997, the latter date being more than six years prior to the debtors' first bankruptcy filing. The Court will direct FSA to file an amended claim consistent with the Court's ruling within thirty days of entry of the Court's order entered in accordance with this Memorandum Opinion.

SIGNED November 18, 2004.

A handwritten signature in black ink, appearing to read "Robert L. Jones", written over a horizontal line.

ROBERT L. JONES  
UNITED STATES BANKRUPTCY JUDGE